

IN THE COURT OF APPEALS OF IOWA

No. 7-296 / 06-1890
Filed June 27, 2007

**IN RE THE MARRIAGE OF RONDA LOUISE LOWRY AND JAMES SCOTT
LOWRY**

**Upon the Petition of
RONDA LOUISE LOWRY,**
Petitioner-Appellee,

**And Concerning
JAMES SCOTT LOWRY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Clarke County, Sherman W.
Phipps, Judge.

James Lowry appeals the custody provisions of the district court's decree
dissolving his marriage to Ronda Lowry. **AFFIRMED.**

A. Zane Blessum, Winterset, and Catherine K. Levine, Des Moines, for
appellant.

Richard R. Ramsey, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

James Lowry appeals the custody provisions of the district court's decree dissolving his marriage to Ronda Lowry. He contends the court erred in denying his request for joint legal custody of the parties' two minor children. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

James and Ronda were married in December 1998. They are the parents of two children, Briana, born in June 1999, and Hope, born in September 2001. Ronda worked outside the home for much of the marriage. James cared for two-year-old Briana while Ronda worked nights for four to five months. During Ronda's pregnancy with Hope, Ronda was diagnosed with HELLP syndrome. Hope was born prematurely in September 2001 and Ronda was in the hospital for several weeks and missed several months of work due to health complications. James satisfactorily cared for Briana during this period. Nevertheless, there does not appear to be any dispute, and the trial court so found, that Ronda was the primary caretaker of the children throughout their lives.

Both parties agree law enforcement was called to their home various times throughout their marriage for domestic disturbances, although the testimony is conflicting as to precisely how many times this occurred. Ronda testified James had threatened her with physical harm on several occasions. On cross-examination, James admitted he had verbally threatened to do bodily harm to Ronda. He also admitted he had called Ronda and faked his own suicide. This involved James calling Ronda, threatening suicide, and then cocking a gun

and firing it so she could hear it over the phone. He testified, however, that he never actually contemplated suicide. Ronda testified James struck her on at least three separate occasions. James denied ever striking her.

The parties separated in approximately August, 2003, reconciled briefly at Christmas time in 2003, and then separated again. James was arrested for operating while intoxicated in January 2004. He successfully completed after-care requirements and testified he now attends AA meetings regularly. James was subsequently arrested for driving while his license was suspended. Ronda filed a petition for dissolution of marriage on February 9, 2006.

Ronda filed a petition for relief from domestic abuse under Iowa Code chapter 236 (2005) in June 2006, and a temporary protective order was issued without hearing. A hearing on the petition was scheduled for July 20, 2006. On the date of the hearing the parties reached an agreement concerning visitation. Thus, the district court continued the hearing and directed that the agreement be reduced to an order for the court's approval within thirty days. However, the parties clearly had differing views concerning the terms of their "agreement" regarding legal custody. A proposed order was prepared by James's attorney. In part it provided for joint custody. Ronda refused to approve the order. Accordingly, no order was ever submitted to the court for approval or filed. The parties eventually agreed the remaining custody issue and other issues would be heard in the dissolution hearing. Ronda testified she had refused to approve the proposed temporary order because she had not agreed to joint custody.

A hearing was held on the dissolution petition on September 12 and 13, 2006. At the hearing Ronda sought sole legal custody and James requested joint custody. The district court entered a decree dissolving the parties' marriage on October 18, 2006. The court found, in relevant part, that: James's testimony was inconsistent, significantly in conflict with his own witnesses, and thus his credibility was "often suspect"; James had not paid any child support to Ronda since their separation; both parties love their children but there was clear and convincing evidence they were not willing or able to communicate regarding the children's best interests; and there was clear and convincing evidence that while James may not have committed physical abuse of Ronda, he does have a history of domestic abuse with her, including mental and emotional abuse. Based on these findings the district court denied James's request for joint legal custody concluding, "joint custody is unreasonable and not in the best interest of the minor children." The court granted James liberal visitation with the children.

James appeals, contending the district court erred in denying his request for joint legal custody of the parties' two minor children. More specifically, he claims Ronda caused the parties' inability to communicate and any allegation of domestic abuse should not prohibit an award of joint legal custody.

II. SCOPE AND STANDARDS OF REVIEW.

We review a district court's ruling on child custody de novo. Iowa R. App. P. 6.4; *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa Ct. App. 1998). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P.

6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value with respect to custodial issues, and this court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

III. MERITS.

“The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances.” *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3) (Supp. 2005), that joint custody is unreasonable and not in the best interest of the children to the extent that the legal custodial relationship between the children and a parent should be severed. Iowa Code § 598.41(2)(b). Included in the factors set forth in section 598.41(3) for the court to consider in determining the best custody arrangement are whether the parents can communicate with each other regarding the children’s needs and whether a history of domestic abuse exists. Iowa Code § 598.41(3)(c), (j). Furthermore, notwithstanding our preference for joint legal custody, “if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists.” *Id.* § 598.41(1)(b). An

unrebutted finding of a history of domestic abuse outweighs consideration of any other section 598.41(3) factor. *Id.* § 598.41(2)(c).

A. COMMUNICATION.

James contends Ronda “caused the parties’ inability to communicate” by securing the June 2006 temporary protective order. He argues the resulting inability to communicate therefore should not prevent a joint custody award.

James’s contention selectively interprets and applies both the district court’s findings and certain underlying facts that are clearly established by the record. The district court not only found that the parties were *unable* to communicate concerning the best interests of the children, but also found that they were *unwilling* to do so. Further, any inability to communicate resulting from the temporary protective order relates only to the two-month period from its issuance in June 2006 to the date of trial in September 2006.

Any unwillingness and inability of the parties to communicate concerning the children no doubt relates to and results from their several years of a troubled and conflicted relationship. As further discussed below, there is a history of domestic abuse of Ronda by James. This abuse occurred as early as 1999, the first year of their marriage, when they lived in Grimes. It thereafter continued and occurred when they later lived at several locations in Osceola. Although James was never charged with domestic abuse, the police were called to both the parties’ home in Grimes and their home in Osceola. Ronda at various points in her testimony described James as controlling, manipulative, dishonest, and at times violent. She testified, and James acknowledged, that he had at times in

anger engaged in conduct such as threatening her with physical violence and violently breaking household furniture. He acknowledged that some such conduct included incidents in the presence of the children.

We agree with the district court that the parties are unwilling and unable to communicate concerning the best interests of the children. We further find that this unwillingness or inability was not caused by the June 2006 temporary protective order.

B. DOMESTIC ABUSE

Although at trial James denied ever striking Ronda or harming her physically in any way, the district court found his credibility to be lacking based on inconsistencies in his testimony and conflict between his testimony and that of his own witnesses. We give considerable deference to the district court's credibility determinations and our own review of the record leads us to agree with the court's determination that James's credibility is suspect.

Our credibility determination is based, in part, on certain inconsistencies in James's testimony. He testified he had not threatened physical harm to Ronda, but then admitted he had threatened her with bodily harm. He denied driving a motorcycle without a driver's license, but then acknowledged having done so. He testified the children had been around when he and Ronda had arguments, but later testified they "weren't around whenever her and I argued."

Additionally, James testified he no longer drank alcoholic beverages, he could not remember when he had his last drink, and had not had a drink all

summer.¹ To the contrary, a friend of both James and Ronda testified James does drink occasionally and that he and James “had some beer” during the summer. Further, one of James’s witnesses testified that although she was not aware whether he had been drinking on Memorial Day 2006, most of the adults present at the holiday gathering were drinking and she was aware James does drink on occasion. In addition, Ronda testified that when on June 9, 2006, she responded to James’s call requesting that she come and get the children, James had a beer in his hand when she arrived.

Nevertheless, and assuming without deciding that James’s testimony he never physically abused Ronda in any way is credible and true, physical abuse is not required to support a finding that domestic abuse has occurred. Domestic abuse includes any assault, as defined in section 708.1 (2005), which occurs between family or household members residing together at the time of the assault. See Iowa Code §§ 236.2(2) and 708.2A(1). Assault is defined, in part, as “Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.” Iowa Code § 708.1(2).

James admitted on cross-examination he had verbally threatened to do bodily harm to Ronda in the past. James is approximately six foot one inch tall and weighs approximately 245 pounds. He agreed that he is pretty intimidating and when he makes a threat somebody would believe he could carry it out.

¹ Presumably he was referring to the summer of 2006 because the dissolution hearing was in September 2006.

Based on the facts and circumstances here, we conclude the actions admitted to by James are alone sufficient to meet the definition of domestic abuse assault.

Although James may not have physically abused Ronda, we agree with the district court that clear and convincing evidence shows a history of domestic abuse. This un rebutted history outweighs any other statutory factor concerning the awarding of custody. Iowa Code § 598.41(2)(c). When combined with the parties' unwillingness and inability to communicate concerning the children's best interest, it fully supports the court's finding that joint custody is unreasonable and not in the best interest of the children in this case.

IV. CONCLUSION.

Based on our de novo review, and for all of the reasons set forth above, we conclude the district court did not err in denying James's request for joint legal custody of the parties' minor children.

AFFIRMED.